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November 10, 2017

VIA E-FILE

Gary Shinnars
Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Re: **Motion for a Final DECISION on the 8(b)(1)(A) Allegation
and Request for Further Clarification**
California Nurses Association (Henry Mayo Newhall Memorial Hospital)
NLRB Case No. **31-CB-012913**

Dear Mr. Shinnars:

We are in receipt of your Order Clarifying issued on October 19, 2017 in response to Henry Mayo Newhall Memorial Hospital's ("Hospital" or "Charging Party") Emergency Motion ("Emergency Motion") for a decision in the above referenced matter. The Order Clarifying reflects the Board's apparent confusion over the status of this case. Contrary to the assertions in the Order Clarifying, the Board's Order Granting Motion for Reconsideration ("Order Granting Reconsideration") was not the final disposition of the matter, and, ***to date, there is no valid decision in this matter.*** Accordingly, Charging Party requests and moves that the Board expeditiously rectify this harmful delay and issue a valid decision consistent with the Hospital's Emergency Motion for a Decision in Case No. 31-CB-012913.¹

A. The Board Vacated The Decision In This Matter And Has Yet To Issue A Final Decision.

On July 2, 2013, an unconstitutionally constituted Board issued a now invalid Decision and Order in this matter, affirming the Administrative Law Judge's ("ALJ") Section 8(b)(3) violation, but erroneously denying the Section 8(b)(1)(A) violation. *California Nurses*

¹ Expediency is even further required as on November 6, 2017 the Compliance Officer for Region 31 issued an inaccurate Compliance Notice based on the Order Clarifying as opposed to the ALJ's decision, further confusing the process. Attached hereto as Exhibit A is the November 6, 2017 Compliance Notice in Case No. 31-CB-012913.

Association, 359 NLRB 1391 (2013). The 2013 Decision and Order was in response to the California Nurses Association's ("Union") request for review appealing the ALJ's well-reasoned and detailed decision. The Board's July 2013 Order upheld the 8(b)(3) violation and directed a remedy requiring Respondent Union to, among other things, "cease and desist from...[i]n any like or related matter restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." *Id.* at 1394. However, the now invalidated 2013 Decision errantly overturned the ALJ's 8(b)(1)(A) decision.

On July 29, 2013, the Union filed a Motion for Reconsideration ***related only to the 8(b)(3) remedy***, asserting that the Board should modify its initial order by removing the general injunctive language. Attached hereto as Exhibit B is the Union's Motion for Reconsideration. The Union's Motion for Reconsideration was narrowly confined to the discrete issue of whether the Board erred by including this general injunctive language in its initial 8(b)(3) order. ***The Union did not seek reconsideration of the Board's findings on the 8(b)(1)(A) and 8(b)(3) violations. Accordingly, the merits of the underlying decision were not before the Board.***² On January 8, 2014, the Board granted the Union's Motion for Reconsideration and modified its initial order by removing the general injunctive language. *California Nurses Association*, 360 NLRB 83 (2014). Importantly, ***the Board did not review, reconsider or ratify its decision on the 8(b)(1)(A) and 8(b)(3) violations.*** Rather, the January 8, 2014 Order Granting Reconsideration merely "modifies its original order;" and it did not vacate and replace or otherwise address the original July 2, 2013 Decision and Order.

Completely separate from the Union's narrow Motion for Reconsideration, on August 22, 2013, the Hospital petitioned the United States District Court for the District of Columbia ("D.C. Circuit") for review of the Board's errant denial of the 8(b)(1)(A) violation. On August 27, 2013, the D.C. Circuit ordered that the case be held in abeyance pending the outcome of the Supreme Court's review of *Noel Canning, v. NLRB*, Case No. 12-1115, so the record was never filed with the Court.³

On June 26, 2014, ***after the Board issued its Order Granting Reconsideration***, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), which effectively invalidated any decision issued by the unconstitutionally constituted Board, including the July 2, 2013 Decision at issue here. In response to *Noel Canning*, the Board exercised its Section 10(d) power to "set aside the Decision and Order" in this matter. Attached

² Likewise, given the Motion for Reconsideration's limited scope and the fact the Hospital was preparing to file an appeal, the Hospital did not file anything in response.

³ The Order Granting Reconsideration was issued ***after*** the D.C. Circuit ordered that the case be held in abeyance pending the outcome of *Noel Canning*. If the Order Granting Reconsideration vacated and replaced the July 2, 2013 Decision, the Board should have and would have notified the D.C. Circuit that the stay should be lifted on the grounds that a constitutional Board issued a valid, appealable decision in this matter.

hereto as Exhibit C is the Board's Order dated June 27, 2014 ("Vacating Order").⁴ The Board also filed a Motion to Dismiss with the D.C. Circuit, which the Court granted on August 15, 2014.⁵ Attached hereto as Exhibit D is the Board's Motion To Dismiss and the Court's Order Granting the Board's Motion To Dismiss. To date, the Board has not issued a valid decision in this case.

B. The Order Granting The Motion For Reconsideration Was Not A Final Disposition Of This Matter.

The Order Clarifying erroneously concludes that the Order Granting Reconsideration constitutes the final disposition in this matter because it was issued by a constitutionally appointed Board. It is axiomatic that there must be a valid decision before there can be a valid order. *Noel Canning* nullified the decision in this matter and, consequently, necessitated a *de novo* review of the Union's Request for Review of the ALJ's decision by the Board. See, e.g., *Banner Health System d/b/a Banner Estrella Medical Center*, 362 NLRB No. 137 (2015) ("In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, above, we have considered *de novo* the judge's decision and the record in light of the exceptions, cross-exceptions, and briefs.") There is absolutely nothing in the Order Granting Reconsideration that even remotely suggests the Board conducted a *de novo* review of the ALJ's decision or otherwise ratified the underlying decision as required after *Noel Canning*.

To the contrary, the Order Granting Reconsideration plainly indicates that Board only considered the single, discrete (unopposed) issue placed before it by the Union's narrowly confined Motion for Reconsideration – whether "the Board erred by including the general injunctive language" in the initial order. Consistent with the limited issue before it, the Order Granting Reconsideration merely modified the July 2, 2013 Order. Nothing in the Order Granting Reconsideration indicates the Board reviewed, ratified, affirmed, or vacated and replaced the underlying July 2, 2013 Decision. In fact, it explicitly conveys the opposite: "Because we find that the Board erred by including the general injunctive language in the Order in the instant case, we grant the Respondent's Motion for Reconsideration and we shall modify the Order and notice accordingly." Importantly, it does not say the Decision was modified or even reviewed.

Indeed, the Board would not have had any occasion or reason to ratify or review *de novo* the underlying decision, as the Union's Motion for Reconsideration did not request it (nor would the Union have had any grounds to do so), and the Supreme Court had not yet issued *Noel Canning* and invalidated the underlying decision. It cannot be assumed that by modifying the

⁴ Clearly, if the Order Granting Reconsideration replaced the original decision, this Vacating Order would not be necessary.

⁵ Likewise, if the Board's Order Granting Reconsideration had replaced the July 2, 2013 Decision and Order, the Board should have and would have informed the D.C. Circuit that the petition was moot or, at the very least, that the stay should be lifted.

July 2, 2013 Order – an action that occurred *before* the Supreme Court issued *Noel Canning* – the Board concomitantly complied with the ineluctable implications of *Noel Canning* when the Board was not and could not possibly have been aware of such a duty at the time and the very language of the Order Granting Reconsideration in no way indicates the Board in fact fulfilled this duty.

C. The Order Granting Reconsideration Cannot Constitute A Final Disposition Of The 8(b)(1)(A) Allegation Because It Did Not Even Address That Allegation.

The Union's Motion for Reconsideration only attacked the remedy on the 8(b)(3) allegation. Neither the Union's Motion for Reconsideration, nor the Board's Order Granting Reconsideration addressed the 8(b)(1)(A) allegation in any manner whatsoever. *California Nurses Association*, 360 NLRB 83 (2014); Exhibit B, Union's Motion for Reconsideration. Even assuming *arguendo* the Order Granting Reconsideration somehow affirmed or vacated and replaced the underlying July 2, 2013 Decision, at best, it would have only done so with respect to the 8(b)(3) allegation. Although the Charging Party believes that even this is an illogical leap given the timing and language of the Order Granting Reconsideration, the Order Granting Reconsideration certainly cannot constitute a final disposition of the 8(b)(1)(A) allegation when absolutely nothing pertaining to this allegation was placed before the Board by the Union, and the Board in no way addressed this allegation in its Order Granting Reconsideration.

The Decision on the 8(b)(1)(A) allegation is what the Hospital appealed in 2013 and that is the allegation the Hospital is waiting for a constitutionally valid decision on. The Board's inexplicable refusal to issue a decision on this allegation has wrongly deprived the Hospital of its protected rights under federal law for more three years. This unjustified deprivation of the Hospital's rights can only be rectified by the Board issuing a valid constitutional decision on the 8(b)(1)(A) allegation, and the Hospital respectfully requests that the Board expeditiously do so consistent with the Hospital's Emergency Motion.

D. The Vacating Order Set Aside The Decision (Including Any Modification).

Even though it is clear that the Order Granting Reconsideration did not ratify or vacate and replace the July 2, 2013 Decision after *Noel Canning* (nor could it have given that it was issued before *Noel Canning*), any lingering doubt as to the invalidity of the July 2, 2013 Decision was questionably eliminated by the Vacating Order. The Vacating Order was issued *after* the Order Granting Reconsideration, and it unambiguously explains that the Board vacated the July 2, 2013 Decision based on *Noel Canning*: "In view of the Court's decision in *Noel Canning*, pursuant to Section 10(d) of the National Labor Relations Act, the Board hereby sets aside the above-referenced Decision and Order." By vacating the July 2, 2013 Decision, the Board necessarily vacated the Order Granting Reconsideration based upon that Decision.

The Order Clarifying's reliance on the Order Granting Reconsideration is clearly erroneous. As noted, that order, at best, merely modified the order portion of the original Decision and Order, leaving the original Decision intact with a modified order. The Board's

subsequent June 26, 2014 Vacating Order then clearly vacated that decision (including its modified order). Thus, modified or not, no valid Decision has been in place since June 26, 2014.

Moreover, the Order Clarifying states that the Vacating Order's statement that the Board would "retain this case on its docket" was errant, but it does not retract the statement vacating the July 2, 2013 Decision. Even if it had, such a retraction would be inconsequential as *Noel Canning* effectively nullified the July 2, 2013 Decision and Order even without Board action. Thus, the Board vacated the Decision in this matter *after* it issued the Order Granting Reconsideration, and it has not renounced the Vacating Order, nor would such a renouncement render the July 2, 2013 Decision constitutional given the impact of *Noel Canning*.

More important, even accepting the Order Clarifying's statement that the Vacating Order was "errant," as explained above, that would leave no Board Decision in place related to the 8(b)(1)(A) allegation. Consequently, the Board needs to either further clarify to inform that it is adopting (or has adopted) the ALJ's well-reasoned Decision and Order on the 8(b)(1)(A) or it needs to issue its own Decision on the 8(b)(1)(A), thus giving the parties an opportunity to analyze that written decision and, if desired, exercise their appeal rights.

E. The Board's Action, Or Lack Thereof, After *Noel Canning* Demonstrates That The Order Granting Reconsideration Did Not Cure The Constitutionally Infirm July 2, 2013 Decision.

a. The Board Did Not Notify The D.C. Circuit To Lift The Stay After It Issued The Order Granting Reconsideration.

Before the Board issued its Order Granting Reconsideration, the Charging Party appealed the Board's erroneous dismissal of the 8(b)(1)(A) allegation. On August 27, 2013, because *part* of the appeal challenged the constitutionality of the Board, the D.C. Circuit stayed the case pending the outcome of *Noel Canning*. The Board issued its Order Granting Reconsideration *four months after* the D.C. Circuit stayed the Hospital's appeal. If, as the Order Clarifying purports, the Order Granting Reconsideration somehow ratified or vacated and replaced the July 2, 2013 Decision, the Court's ongoing stay would have been unnecessary, and the Board should have and would have notified the Court that the stay should be lifted. It did not.

b. The Board Vacated The Underlying Decision *After* The Order Granting Reconsideration.

The Board was presumably aware of the Order Granting Reconsideration when it issued the Vacating Order *six months after* it issued the Order Granting Reconsideration. Thus, the very issuance of the Vacating Order demonstrates that the Order Granting Reconsideration is not the final disposition of this matter because, if it was, there simply would have been no need to issue the Vacating Order.

**c. The Board Filed A Motion To Dismiss The Charging Party's Appeal
After The Order Granting Reconsideration Issued.**

After issuing the Order Granting Reconsideration, the Board filed a Motion To Dismiss with the D.C. Circuit. That Motion unequivocally states that, given the Vacating Order, there is no longer a valid decision and order in this case to appeal:

Exercising its Section 10(d) authority, the Board on June 27, 2014, issued an Order setting aside the Decision and Order currently pending review in this case....Because the Board has exercised its authority to set aside the Decision and Order that is the subject of the petition for review, *there is no order pending this Court's review.*

Exhibit D, Board's Motion To Dismiss and the Court's Order Granting the Board's Motion To Dismiss (emphasis added).

The Board filed this Motion to Dismiss six months *after* issuing the Order Granting Reconsideration. Again, the Board must have been aware of the Order Granting Reconsideration and, if it believed the Order Granting Reconsideration ratified the underlying decision in this matter, its Motion To Dismiss would have been completely unnecessary. At the very least, it certainly would not have informed the D.C. Circuit that "there is no order pending this Court's review."

F. Alternatively, The Board Should Notify The D.C. Circuit Of The Error So The Charging Party Can Pursue Its Appeal.

Based on the Board's Vacating Order and its Motion to Dismiss, the D.C. Circuit dismissed the Charging Party's appeal on August 15, 2014: "Upon consideration of respondent's motion to dismiss case, it is ORDERED that the motion be granted, and this case be dismissed." If the Board mistakenly vacated the July 2, 2013 Decision and Order, then the Charging Party respectfully requests that it promptly notify the D.C. Circuit of its mistake so that the Charging Party can reinitiate its appeal without issue.

G. Requests For Further Clarification.

Notwithstanding the foregoing, if the Board decides to stand on the Order Clarifying rather than issue a constitutionally valid decision, the Charging Party respectfully requests that the Board provide the following information as further clarification, which is necessary to permit the Charging Party to proceed with its appeal in the D.C. Circuit.

1. Given that *Noel Canning* necessitated a *de novo* review of all decisions rendered by the constitutionally infirm Board, what language in the Order Granting Reconsideration demonstrates that the Board conducted a *de novo* review of the July 2, 2013 Decision?

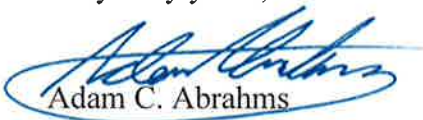
2. If there is no language in the Order Granting Reconsideration that demonstrates the Board conducted the *de novo* review mandated by *Noel Canning*, how does the current Board know such a review was, in fact, undertaken?
3. Given that the Order Granting Reconsideration was issued **before** *Noel Canning*, why would the Board have conducted a *de novo* review of the July 2, 2013 Decision if the July 2, 2013 Decision had not yet been invalidated by the Supreme Court and the Union did not request such a *de novo* review in its Motion for Reconsideration. See Exhibit B, Union's Motion for Reconsideration.
4. What was the Board's final disposition of the 8(b)(1)(A) allegation?
5. What language in the Order Granting Reconsideration conveys the Board's final disposition of the 8(b)(1)(A) allegation?
6. If there is no language in the Order Granting Reconsideration that addresses the 8(b)(1)(A) allegation, how does the Order Granting Reconsideration constitute the final disposition of the 8(b)(1)(A) allegation?
7. Is it the Board's position that the ALJ Decision on the 8(b)(1)(A) allegation stands? If not, which decision of a constitutionally appointed Board invalidates it?
8. If the Order Granting Reconsideration was the final disposition in this matter, why did the Board fail to notify the D.C. Circuit that the stay should be lifted after the Order Granting Reconsideration was issued?
9. If the Order Granting Reconsideration was the final disposition in this matter, why did the Board issue the Vacating Order setting aside the July 2, 2013 Decision in this matter **after** it issued the Order Granting Reconsideration?
10. If the Order Granting Reconsideration was the final disposition in this matter, why did the Board petition the D.C. Circuit to dismiss the Charging Party's appeal **after** it issued the Order Granting Reconsideration on the grounds that "there is no order pending this Court's review." See Exhibit D, Board's Motion To Dismiss and the Court's Order Granting the Board's Motion To Dismiss.
11. If the Order Granting Reconsideration was the final disposition in this matter, why did the Board fail to notify the D.C. Circuit that its Motion to Dismiss was moot because a constitutionally appointed Board had subsequently issued a valid decision in this matter on January 8, 2014?

12. Given the Board's delayed and "errant" handling of this motion, what procedures does the Charging Party have available to vindicate its rights for the 8(b)(1)(A) allegation?⁶

Prompt resolution of unfair labor practices is the bedrock of effective administration of the National Labor Relations Act and prevents a party's unduly coercive actions from wreaking havoc in the workplace. The Charging Party, its employees, and thousands of other employees nationwide have been thrown into limbo by the Board's oversight of this case and have been left without a remedy for the Union's coercive conduct for seven years. As detailed above, the Order Granting Reconsideration did not constitute a *de novo* review of the underlying ALJ decision and the record, as required after *Noel Canning*, nor did it otherwise vacate and replace or ratify the decision. It merely modified the initial order on the 8(b)(3) allegation. If the Board continues to insist, despite its previous actions to the contrary, that the Order Granting Reconsideration constitutes the final disposition of this matter – notwithstanding the fact that it was issued six months *before* *Noel Canning* nullified the July 2, 2013 Decision and the validity of the decision was not placed before the Board by either party or the Supreme Court at the time the Order Granting Reconsideration was issued – Charging Party respectfully requests clarification of the Board's justification for its position in light of the information detailed in this letter.

The National Labor Relations Act gives the Charging Party an unassailable right to a decision on the *merits* of both the 8(b)(1)(A) and 8(b)(3) allegations by a constitutionally appointed Board, but this right has thus far been unjustifiably denied. Although a constitutionally constituted Board issued the Order Granting Reconsideration, the decision upon which that order was based was subsequently invalidated by the United States Supreme Court, and the Board has taken no further action on this matter despite its unequivocal duty to do so following *Noel Canning*. Accordingly, the Charging Party respectfully requests that the Board remedy this unreasonable delay and issue a constitutional decision in this matter. If the Board harbors any lingering confusion over why the Order Granting Reconsideration does not cure the constitutional defects in the underlying decision post *Noel Canning*, the Charging Party's counsel is amenable to a call with all parties to further discuss this matter.

Very truly yours,



Adam C. Abrahms

ACA:su

⁶ Clearly, appealing either the Order Clarifying or the Order Granting Reconsideration to the D.C. Circuit would result in a non-substantive procedural decision in which the D.C. Circuit ultimately would rebuke the Board's errant handling of this matter and result in an order that the Board do exactly what the Charging Party is requesting – issue a valid decision on the 8(b)(1)(A) allegation or adopt the well-reasoned ALJ Decision.

CERTIFICATE OF SERVICE

I, Shelly Ulaj, HEREBY CERTIFY that on the 10th day of November, 2017, I served a true and correct copy of "**Motion for a Final DECISION on the 8(b)(1)(A) Allegation and Request for Further Clarification**" by First-Class United States Mail, postage prepaid, and via e-mail upon the following:

Rob Craven
CNA/NNOC Legal Department
National Nurses Organizing Committee
2000 Franklin Street
Oakland, CA 94612
Telephone: 510-273-2270
Facsimile: 510-663-482
Email: RCraven@CalNurses.org

Brendan White, Esq.
CNA/NNOC Legal Department
2000 Franklin Street
Oakland, CA 94612
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Facsimile 510-663-4822
Email: BWhite@CalNurses.org

Nikki N. Cheaney, Esq.
National Labor Relations Board - Region 31
1150 W. Olympic Boulevard, Suite 700
Los Angeles, CA 90064-1824
Telephone: 310-235-7712
Facsimile: 310-235-7420
Email: Nikki.Cheaney@nrlb.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 10, 2017



Shelly Ulaj
Epstein Becker & Green, P.C.
1925 Century Park East, Suite 500
Los Angeles, CA 90067

EXHIBIT A



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 31
11500 West Olympic Blvd - Suite 600
Los Angeles, CA 90064-1753

Agency Website: www.nlrb.gov
Telephone: (310)235-7351
Fax: (310)235-7420

Agent's Direct Dial: (310)307-7342

November 06, 2017

EPSTEIN BECKER & GREEN

NOV 09 2017

Micah Berul, In-House Counsel
California Nurses Assn/National Nurses
Organizing Committee (CNA/NNU)
155 Grand Avenue
Oakland, CA 94612-3758

Re: California Nurses Association, National
Nurses Organizing Committee
(Henry Mayo Newhall Memorial Hospital)
Case 31-CB-012913

Dear Mr. Berul:

Enclosed is a copy of the Board's Order Clarifying in the above matter that issued on October 19, 2017. Please let me know by November 20, 2017, whether or not California Nurses Association, National Nurses Organizing Committee, hereinafter referred to as Respondent, intends to comply with the Board's order. If Respondent does not intend to comply with the Board's order, this matter will be referred for enforcement proceedings in the appropriate United States Court of Appeals.

In anticipation of Respondent's willingness to comply, this letter discusses what Respondent needs to do to comply with the Board's order.

Post Notice: Enclosed are eight (8) copies of the Notice to Employees and Members. The Notices should be posted within 14 days from the date of this letter. A responsible official of Respondent, not Respondent's attorney, must sign and date the Notices before posting them. The Notices should be conspicuously displayed including all places where notices to employees and members are customarily posted for a period of 60 consecutive days at Respondent's union offices and meeting halls in Glendale, California. Further, if Respondent maintains bulletin boards at the facility of the Employer where the unfair labor practices occurred, Respondent must also post Notices on each such bulletin board during the posting period. Respondent must take reasonable steps to ensure that the Notices are not altered, defaced or covered by other material. If additional Notices are required, please let me know. During the posting period, a member of the Regional Office staff may visit Respondent's facility to inspect the Notices.

Electronic Posting: The Board's order provides that Respondent will also post the Notice electronically, such as posting on an intranet or internet site, *if Respondent customarily communicates with its members by such means*, and keep it continuously posted there for 60 consecutive days. Respondent will furnish the Regional Office with a paper copy of the intranet or website posting along with the attached completed Certification of Compliance (Part One.) In the event Respondent's intranet is password protected, the Compliance Officer will contact you if it is necessary to obtain the password for the intranet site.

Electronic Mailing: The Board's order provides that Respondent will also distribute the Notice electronically, such as by email, *if Respondent customarily communicates with its members by such means*. Respondent should forward a copy of that electronic mailing, at the time that it is sent, transmitting the Notice to Employees and Members, with all of the recipients' electronic addresses to the Compliance Officer at Kristen.Scott@nlrb.gov. If Respondent does not customarily communicate with its members by electronic means such as by email, posting on an intranet or internet site, it should so advise the Compliance Officer, in writing.

Certifications of Compliance: Certification of Compliance forms are enclosed. Certification of Compliance (Part One) addresses all communication means by which Respondent has complied with the Board's requirement to inform employees of the signed Notice to Employees and Members and should be completed and returned **with four (4) signed and dated Notices by November 20, 2017**, for the Employer to post at its Valencia California facility, if willing. The Certification of Compliance (Part Two) addresses affirmative actions Respondent is required to take pursuant to the Board's order and should be completed and returned **by November 27, 2017**.

Remedial Actions:

Reprint and deliver to Henry Mayo Newhall Memorial Hospital: The Board's order provides that Respondent will reprint and deliver to Henry Mayo Newhall Memorial Hospital, at the Respondent's sole expense, copies of the collective-bargaining agreement without "The Weingarten Rights" statement or any other additional language printed thereon or appended thereto, unless the Hospital agrees to such language. Please provide the Compliance Officer with documentation that these steps have been taken by November 27, 2017.

Closing the Case: When all of the affirmative provisions of the Board's order have been fully complied with and there are no reported violations of its negative provisions, you will be notified that the case has been closed on compliance. Timely receipt of the signed and dated Notice(s) to Employees and Members and required Sworn Certification of Compliance forms will assist the Region in closing the case in a timely manner.

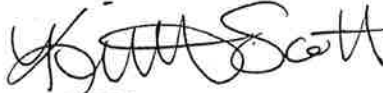
California Nurses Association, National
Nurses Organizing Committee
(Henry Mayo Newhall Memorial Hospital)
Case 31-CB-012913

- 3 -

November 06, 2017

Your cooperation in this matter will be appreciated.

Very truly yours,



KRISTEN SCOTT
Compliance Officer

Enclosures: Board Order Clarifying / Board Order dated January 08, 2014
Notices to Employees and Members
Certification of Compliance Form, Part One
Certification of Compliance Form, Part Two.

cc: M. Jane Lawhon, Legal Counsel
California Nurses Assn/ National
Nurses United (CNA/NNU)
155 Grand Avenue, Legal Dept.
Oakland, CA 94612

Pamela Allen, Legal Counsel
California Nurses Assn/ National
Nurses United (CNA/NNU)
155 Grand Avenue, Legal Dept.
Oakland, CA 94612

Adam Diaz, Labor Representative
California Nurses Association, National
Nurses Organization Committee
225 West Broadway, Suite 500
Glendale, CA 91204-1269

Adam C. Abrahms, Esq.
Epstein Becker & Green
1925 Century Park East, Suite 500
Los Angeles, CA 90067-2706

CERTIFICATION OF COMPLIANCE
(PART ONE)

RE: California Nurses Association, National Nurses Organizing Committee
(Henry Mayo Newhall Memorial Hospital)
Case 31-CB-012913

[If additional space is needed to provide a full response, attach a sheet(s) with the necessary information.]

As required by the Board's order in this matter, this document is a sworn certification of the steps that Respondent has taken to comply with the Board's order.

Physical Posting - Notice to Employees and Members

The signed and dated Notice in the above matter was posted on (date) _____
at the following locations: *(Please list specific places of posting at the facility.)*

- Four (4) copies of the signed Notice are attached.

Intranet Posting - Notice to Employees and Members

The signed Notice in the above matter was posted on Respondent's intranet/website on (date) _____.
A copy of the intranet/website posting is attached.

Electronic Mailing - Notice to Employees and Members

The signed and dated Notice in the above captioned matter was e-mailed on (date) _____ to
all affected employees and members. A list of names and addresses of individuals to whom the Notices
were e-mailed is attached. The electronic mailing transmitting the Notice was sent to the Compliance
Officer on (date) _____.

I have completed this Certification of Compliance (Part One) and state under penalty of perjury that it is
true and correct.

RESPONDENT

By: _____
Title: _____
Date: _____

This form should be completed and returned to the Compliance Officer.

CERTIFICATION OF COMPLIANCE
(PART TWO)

RE: California Nurses Association, National Nurses Organizing Committee
(Henry Mayo Newhall Memorial Hospital)
Case 31-CB-012913

As required by the Board's order in this matter, this document is a sworn certification of the steps that Respondent has taken to comply with the Board's order.

Reprint and deliver to Henry Mayo Newhall Memorial Hospital

On (date) _____, the Union reprinted and delivered to Henry Mayo Newhall Memorial Hospital, at the Union's sole expense, copies of the collective-bargaining agreement without "The Weingarten Rights" statement or any other additional language printed thereon or appended thereto, that is the subject of the Board's order and referenced in the Notice to Employees and Members. Attached is a copy of the documentation stating when the copies were delivered, and to whom the copies were delivered.

I have completed this Certification of Compliance (Part Two) and state under penalty of perjury that it is true and correct.

RESPONDENT

By: _____
Title: _____
Date: _____

This form should be completed and returned to the Compliance Officer.



United States Government

**OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570**

Re: Henry Mayo Newhall Memorial Hospital
Case 31-CB-012913

ORDER CLARIFYING

On July 2, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 150. Thereafter, on June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning, a Division of the Noel Corp.*, 134 S.Ct. 2550 (2014). In light of the Court's decision in *Noel Canning*, pursuant to Section 10(d) of the National Labor Relations Act, the Board issued an order on June 27, 2014 setting aside the above-referenced Decision and Order. This order stated that the Board would retain the case on its docket and take further action as appropriate. On January 8, 2014, however, a properly configured panel of the National Labor Relations Board had issued an order granting Respondent California Nurses Association, National Nurses Organizing Committee's motion for reconsideration in this case, which is reported at 360 NLRB 83 (2014). This decision, issued in January 2014, was a final disposition of the matters pending in this case. Therefore, the statement in the June 27, 2014 order that the Board would retain the case on its docket was an inadvertent error.

On October 16, 2017, Charging Party Henry Mayo Newhall Memorial Hospital filed with the Office of Executive Secretary an Emergency Motion for a Decision in Case

No. 31-CB-012913. As the Board Order issued at 360 NLRB 83 (2014) is the final Order in this case, the Board will not take any further action in the subject case.

Dated, Washington, D.C., October 19, 2017.

By direction of the Board:

/s/ Gary Shinnars
Executive Secretary

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

California Nurses Association, National Nurses Organizing Committee and Henry Mayo Newhall Memorial Hospital. Case 31-CB-012913

January 8, 2014

ORDER GRANTING MOTION FOR RECONSIDERATION

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

On July 2, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding.¹ The Board affirmed the judge's finding that the Respondent violated Section 8(b)(3) of the Act by printing a *Weingarten*² statement on the back cover of its collective-bargaining agreement with the employer that was contrary to the parties' settled understanding on the issue of cover text but reversed the judge's finding that the Respondent's conduct violated Section 8(b)(1)(A) of the Act. As part of its Order remedying the 8(b)(3) violation, the Board ordered that the Respondent cease and desist from "[i]n any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."³

On July 29, 2013, the Respondent filed a motion for reconsideration asserting that the Board should remove the "like or related manner" language from the Order in light of the Board's dismissal of the 8(b)(1)(A) allegation. Neither the Acting General Counsel nor the Charging Party opposed the motion.

The Board has long recognized that a violation of Section 8(b)(1)(A), which prohibits labor organizations from restraining or coercing employees in the exercise of their Section 7 rights, is not a derivative violation of an 8(b)(3) violation. *National Maritime Union (Texas Co.)*, 78 NLRB 971, 985 (1948), *enfd.* 175 F.2d 686 (2d Cir. 1949), *cert. denied* 338 U.S. 954 (1950). Accordingly, the Board's general injunctive language for 8(b)(1)(A) violations—ordering a party to cease and desist from "[i]n any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act"—is not appropriate where a party has violated only Section 8(b)(3). See, e.g., *Demolition Workers Local 95*, 330 NLRB 352, 352 fn. 3 (1999); *California Nurses Assn.*, 326 NLRB 1362, 1362

fn. 1 (1998), *Painters (Northern California Drywall Contractors Assn.)*, 326 NLRB 1074, 1074 fn. 2 (1998); *Paperworkers Local 620 (International Paper Co.)*, 309 NLRB 44, 44 fn. 3 (1992).

Because we find that the Board erred by including general injunctive language in the Order in the instant case, we grant the Respondent's Motion for Reconsideration and we shall modify the Order and notice accordingly.

ORDER

The Respondent's Motion for Reconsideration is granted. Accordingly, the National Labor Relations Board modifies its original Order and orders that the Respondent, California Nurses Association, National Nurses Organizing Committee, Oakland, California, its officers, agents, and representatives, shall

1. Cease and desist from printing and maintaining copies of the collective-bargaining agreement containing additional language contrary to the agreement of the parties (e.g., including on the back cover a statement entitled, "The *Weingarten* Rights") without the consent of the Hospital.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reprint and deliver to the Henry Mayo Newhall Memorial Hospital, at the Respondent's sole expense, copies of the collective-bargaining agreement without "The *Weingarten* Rights" statement or any other additional language printed thereon or appended thereto, unless the Hospital agrees to such language.

(b) Within 14 days after service by the Region, post at its union offices and meeting halls in Glendale, California copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ 359 NLRB No. 150.

² *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

³ 359 NLRB No. 150, slip op. at 4.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

es are not altered, defaced, or covered by any other material.

(c) Within 14 days after service by the Region, deliver to the Regional Director for Region 31 signed copies of the notice in sufficient number for posting by Henry Mayo Newhall Memorial Hospital at its Valencia, California facility, if it wishes, in all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 8, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT print and maintain copies of the collective-bargaining agreement containing additional language contrary to the agreement of the parties (e.g., including on the back cover a statement entitled "The *Weingarten* Rights"), without the consent of the Hospital.

WE WILL reprint and deliver to the Henry Mayo Newhall Memorial Hospital, at our sole expense, copies of the collective-bargaining agreement without "The *Weingarten* Rights" statement or any other additional language printed thereon or appended thereto, unless the Hospital agrees to such language.

CALIFORNIA NURSES ASSN., NATIONAL NURSES
ORGANIZING COMMITTEE

UNITED STATES
NATIONAL LABOR RELATIONS BOARD
REGION 31
11500 WEST OLYMPIC BOULEVARD - SUITE 600
LOS ANGELES, CA 90064-1824
An Equal Opportunity Employer

OFFICIAL BUSINESS

Adam C. Abrahms, Esq.
Epstein Becker & Green
1925 Century Park East, Suite 500
Los Angeles, CA 90067-2706



EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

In a Matter Between:

CALIFORNIA NURSES ASSOCIATION
NATIONAL NURSES ORGANIZING
COMMITTEE (CNA/NNOC)

Respondent,

and

HENRY MAYO NEWHALL
MEMORIAL HOSPITAL,

Charging Party.

Case 31-CB-012913

RESPONDENT'S MOTION FOR RECONSIDERATION OF BOARD DECISION

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING COMMITTEE
(CNA/NNOC)
LEGAL DEPARTMENT
Brendan White
2000 Franklin Street
Oakland, CA 94612
Telephone (510) 273-2273
Fax (510) 663-4822
Counsel for Respondent CNA/NNOC

Pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations, California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), herein called Respondent or the Union, requests reconsideration by the Board of a portion of its Decision in *California Nurses Association (Henry Mayo Newhall Memorial Hospital)*, 359 NLRB No. 150, which issued on July 2, 2013. Respondent submits that the inclusion of paragraph 1.(b) of the Board's Order and the inclusion of the provision "WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above" in the Notice constitutes material error.

In the Decision which issued July 9, 2012, Administrative Law Judge Mary Miller Cracraft found that the Union's inclusion of the *Weingarten* Rights statement on the back cover of the collective bargaining agreement between the Union and Henry Mayo Newhall Memorial Hospital constituted a violation of Section 8(b)(1)(A) of the Act as well as Section 8(b)(3) of the Act. Among the provisions in her proposed Order was paragraph 1.(d), which ordered the Union to cease and desist from: "In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." (*Slip op.*, p. 10) Both of her proposed Notices contained a paragraph which stated: "WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act." (*Slip op.*, pp. 11-12)

The Union filed exceptions to the findings, conclusions, and recommendations of the Administrative Law Judge, including a specific exception (Exception 41) to the proposed cease and desist order and the proposed Notices, which contended that the recommended remedy is not supported by Board Law.

On July 2, 2013, the Board issued its Decision and Order, in which the Board found a violation of Section 8(b)(3) but also found that the inclusion of the *Weingarten* Rights statement on the back cover of the collective bargaining agreement did not violate Section 8(b)(1)(A) of

the Act. (*Slip op.*, p. 3)

In light of the Board's express finding that the Union did not violate Section 8(b)(1)(A) of the Act, the inclusion of paragraph 1.(b) in the Board's Order and the provision, "WE WILL NOT in any like or related manner restrain or coerce you [the employees] in the exercise of the rights listed above" in the Notice is contrary to established Board precedent.

Shortly after the enactment of the Taft-Hartley Amendments, the Board considered the legislative history and concluded that a violation of Section 8(b)(3) of the Act does not create a derivative violation of Section 8(b)(1)(A) of the Act, holding, "Nothing in this legislative history indicates that a union which refuses to bargain is to be considered as having *per se* 'restrained' or 'coerced' employees in the exercise of their rights guaranteed in Section 7 ..." *National Maritime Union*, 78 NLRB 971, 985 (1948), *enf.* 175 F. 2d 686 (2nd Cir. 1949), *cert. denied* 338 U.S. 954 (1950). The Board's interpretation of Section 8(b)(1)(A) of the Act in this case was later cited with approval by the Supreme Court in *NLRB v. Drivers Local 639 (Curtis Bros.)*, 363 U.S. 274, 290-291 (1960), and *Scofield v. NLRB*, 394 U.S. 423, 428 (1968).

In circumstances in which there has been a violation of Section 8(b)(3), but no independent violation of Section 8(b)(1)(A), the Board has specifically deleted general injunctive "like or related" language from the Order and the Notice because a violation of Section 8(b)(3) does not give rise to a derivative violation of Section 8(b)(1)(A) of the Act. *Demolition Workers Union Local 95 (Mackroyce Dismantling, Ltd.)*, 330 NLRB 352, fn.3(1999); *California Nurses Association (Alta Bates Medical Center)*, 326 NLRB 1362, fn.1 (1998); see also *Road Sprinkler Fitters Local Union No. 669 (Lexington Fire Protection Group, Inc.)* 318 NLRB 347, fn.4 (1995).

In view of the Board's express finding in the instant case that the Union did not violate Section 8(b)(1)(A) of the Act by including the *Weingarten* Rights statement on the back cover of

the collective bargaining agreement, it is contrary to established Board precedent to require the Union to cease and desist from "In any like or related manner coercing or restraining employees in the exercise of the rights guaranteed them by Section 7 of the Act," and it is likewise contrary to established Board precedent to include language to that effect in the Notice.

Therefore, the Union requests that the Board modify its Decision in this matter by deleting paragraph 1.(b) from the Board's Order and by deleting from the Notice the paragraph which reads "WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above."

DATED: July 29, 2013

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES ORGANIZING COMMITTEE
(CNA/NNOC)
LEGAL DEPARTMENT



Brendan White
Attorney for Respondent CNA/NNOC

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, not a party to the within action and that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served the following documents:

RESPONDENT'S MOTION FOR RECONSIDERATION OF BOARD DECISION
[Case 31-CB-012913]

Via electronic mail as follows:

Nikki Cheaney, Counsel for Acting General Counsel
National Labor Relations Board
Region 31
11150 West Olympic Blvd, Suite 700
Los Angeles, CA 90064-1824
nikki.cheaney@nrlrb.gov

Adam C. Abrahms, Esq.
Epstein Becker Green
1925 Century Park East, Suite 500
Los Angeles, CA 90067-2506
aabrahms@ebglaw.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 29, 2013, at Oakland, California.

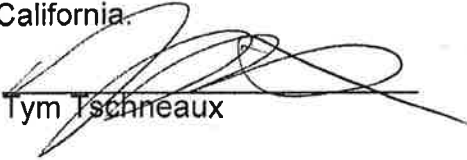

Tym Tschneaux

EXHIBIT C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION,
NATIONAL NURSES ORGANIZING
COMMITTEE

and

Case 31-CB-012913

HENRY MAYO NEWHALL MEMORIAL
HOSPITAL

ORDER

On July 2, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 150. Thereafter, an application for enforcement and/or petition for review was filed in the United States Court of Appeals for the District of Columbia. Subsequently, the court ordered that the proceedings be held in abeyance, and the record in this case was not filed with the court.

On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning, a Division of the Noel Corp.*, No. 12-1281, S.Ct., 2014 WL 2882090 (June 26, 2014). In view of the Court's decision in *Noel Canning*, pursuant to Section 10(d) of the National Labor Relations Act, the Board hereby sets aside the above-referenced Decision and Order.¹ The

¹ Section 10(d) states "[u]ntil the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." See also *In re NLRB*, 304 U.S. 486 (1938)

Board will retain this case on its docket and take further action as appropriate.

Dated, Washington, D.C., June 27, 2014

By direction of the Board:

Gary Shinnors
Executive Secretary

EXHIBIT D

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**HENRY MAYO NEWHALL
MEMORIAL HOSPITAL**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Nos. 13-1244

**Board Case No.
31-CB-012913**

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD
FOR DISMISSAL OF CASE**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully requests that the Court dismiss this case because the Board, pursuant to Section 10(d) of the National Labor Relations Act (29 U.S.C. §160(d)), has vacated the order pending before the Court. In support of this motion, the Board shows as follows:

1. On July 2, 2013, the Board issued a Decision and Order in this case, which is reported at 359 NLRB No. 150.

2. Petitioner filed a petition for review of that Order on August 22, 2013.

The Court put the case in abeyance on August 27, 2013, before the Board filed the record.

3. Section 10(d) of the NLRA provides that, “[u]ntil the record in a case shall have been filed in a court, . . . the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.” Exercising its Section 10(d) authority, the Board on June 27, 2014, issued an Order setting aside the Decision and Order currently pending review in this case. It did so in response to the Supreme Court’s decision in *NLRB v. Noel Canning*, No. 12-1281, ___ S. Ct. ___, 2014 WL 2882090 (June 26, 2014). The Board’s Order is attached.

4. The Board’s exercise of its Section 10(d) authority is in accord with long-established precedent. The Supreme Court has explained that Section 10(d) empowers the Board, before the filing of the record, “to vacate or modify its orders.” *In re National Labor Relations Board*, 304 U.S. 486, 494 (1938). In that case, the Court further held that, because the Act so empowers the Board, “it does not confer jurisdiction upon the reviewing court to prohibit the exercise of the granted power.” *Id.* As the Court concluded, while the Act “plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board’s order in the respects indicated by the act once the transcript of the Board’s

proceedings is before it[, i]t is equally plain that the court is to have no power to prevent the Board from vacating or modifying its order prior to such plenary submission of the cause.” *Id.*

5. Because the Board has exercised its authority to set aside the Decision and Order that is the subject of the petition for review, there is no order pending this Court’s review. *See In re National Labor Relations Board*, 304 U.S. at 495 (observing that had the circuit court not improperly restrained the Board, “its order would have been vacated and there now would be no order outstanding”). Accordingly, the case must be dismissed. *See Harris v. NLRB*, 100 F.2d 197, 197 (3d Cir. 1938) (dismissing case where Board vacated order to be reviewed prior to filing of record). Numerous unreported orders of this Court are in accord. *See, e.g., Fred Meyer Stores, Inc. v. NLRB*, Case No. 10-1010 (D.C. Cir., dismissed Aug. 19, 2010), *Regency Heritage Nursing & Rehab. Ctr. v. NLRB*, Case Nos. 09-1132, 09-1146 (D.C. Cir., dismissed Aug. 19, 2010); *Starbucks Corp. v. NLRB*, Case Nos. 09-1273, 09-1295 (D.C. Cir., dismissed Aug. 19, 2010).

WHEREFORE, the Board respectfully requests that this Court dismiss this case.

Respectfully submitted,

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington DC 20570
(202) 273-2960

Dated at Washington, DC
this 27th day of June 2014

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION,
NATIONAL NURSES ORGANIZING
COMMITTEE

and

Case 31-CB-012913

HENRY MAYO NEWHALL MEMORIAL
HOSPITAL

ORDER

On July 2, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 150. Thereafter, an application for enforcement and/or petition for review was filed in the United States Court of Appeals for the District of Columbia. Subsequently, the court ordered that the proceedings be held in abeyance, and the record in this case was not filed with the court.

On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, a Division of the Noel Corp., No. 12-1281, S.Ct., 2014 WL 2882090 (June 26, 2014). In view of the Court's decision in *Noel Canning*, pursuant to Section 10(d) of the National Labor Relations Act, the Board hereby sets aside the above-referenced Decision and Order.¹ The

¹ Section 10(d) states "[u]ntil the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." See also *In re NLRB*, 304 U.S. 486 (1938)

Board will retain this case on its docket and take further action as appropriate.

Dated, Washington, D.C., June 27, 2014

By direction of the Board:

Gary Shinnery
Executive Secretary

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**HENRY MAYO NEWHALL
MEMORIAL HOSPITAL**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Nos. 13-1244

**Board Case No.
31-CB-012913**

CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 27(a)(4), counsel for the Board certifies the following: Henry Mayo Newhall Memorial Hospital, the petitioner herein, was the charging party in the case before the Board. The Board is the respondent herein, and the Board's General Counsel was a party to the case before the Board. California Nurses Association, National Nurses Organizing Committee was the respondent before the Board.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 27th day of June 2014

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**HENRY MAYO NEWHALL
MEMORIAL HOSPITAL**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Nos. 13-1244

**Board Case No.
31-CB-012913**

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 27th day of June 2014

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**HENRY MAYO NEWHALL
MEMORIAL HOSPITAL**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Nos. 13-1244

**Board Case No.
31-CB-012913**

**AMENDED MOTION OF THE NATIONAL LABOR
RELATIONS BOARD FOR DISMISSAL OF CASE**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully requests that the Court dismiss this case because the Board, pursuant to Section 10(d) of the National Labor Relations Act (29 U.S.C. §160(d)), has vacated the order pending before the Court. In support of this amended motion, the Board shows as follows:

1. On July 2, 2013, the Board issued a Decision and Order in this case, which is reported at 359 NLRB No. 150.

2. Petitioner filed a petition for review of that Order on August 22, 2013.

The Court put the case in abeyance on August 27, 2013, before the Board filed the record.

3. Section 10(d) of the NLRA provides that, “[u]ntil the record in a case shall have been filed in a court, . . . the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.” Exercising its Section 10(d) authority, the Board on June 27, 2014, issued an Order setting aside the Decision and Order currently pending review in this case. It did so in response to the Supreme Court’s decision in *NLRB v. Noel Canning*, No. 12-1281, ___ S. Ct. ___, 2014 WL 2882090 (June 26, 2014). The Board’s signed Order is attached.

4. The Board’s exercise of its Section 10(d) authority is in accord with long-established precedent. The Supreme Court has explained that Section 10(d) empowers the Board, before the filing of the record, “to vacate or modify its orders.” *In re National Labor Relations Board*, 304 U.S. 486, 494 (1938). In that case, the Court further held that, because the Act so empowers the Board, “it does not confer jurisdiction upon the reviewing court to prohibit the exercise of the granted power.” *Id.* As the Court concluded, while the Act “plainly indicates that the purpose was to give the court full and exclusive jurisdiction to review the Board’s order in the respects indicated by the act once the transcript of the Board’s

proceedings is before it[, i]t is equally plain that the court is to have no power to prevent the Board from vacating or modifying its order prior to such plenary submission of the cause.” *Id.*

5. Because the Board has exercised its authority to set aside the Decision and Order that is the subject of the petition for review, there is no order pending this Court’s review. *See In re National Labor Relations Board*, 304 U.S. at 495 (observing that had the circuit court not improperly restrained the Board, “its order would have been vacated and there now would be no order outstanding”). Accordingly, the case must be dismissed. *See Harris v. NLRB*, 100 F.2d 197, 197 (3d Cir. 1938) (dismissing case where Board vacated order to be reviewed prior to filing of record). Numerous unreported orders of this Court are in accord. *See, e.g., Fred Meyer Stores, Inc. v. NLRB*, Case No. 10-1010 (D.C. Cir., dismissed Aug. 19, 2010), *Regency Heritage Nursing & Rehab. Ctr. v. NLRB*, Case Nos. 09-1132, 09-1146 (D.C. Cir., dismissed Aug. 19, 2010); *Starbucks Corp. v. NLRB*, Case Nos. 09-1273, 09-1295 (D.C. Cir., dismissed Aug. 19, 2010).

WHEREFORE, the Board respectfully requests that this Court dismiss this case.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington DC 20570

(202) 273-2960

Dated at Washington, DC
this 30th day of June 2014

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION,
NATIONAL NURSES ORGANIZING
COMMITTEE

and

Case 31-CB-012913

HENRY MAYO NEWHALL MEMORIAL
HOSPITAL

ORDER

On July 2, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 150.

Thereafter, an application for enforcement and/or petition for review was filed in the United States Court of Appeals for the District of Columbia. Subsequently, the court ordered that the proceedings be held in abeyance, and the record in this case was not filed with the court.

On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, a Division of the Noel Corp., No. 12-1281, S.Ct., 2014 WL 2882090 (June 26, 2014). In view of the Court's decision in *Noel Canning*, pursuant to Section 10(d) of the National Labor Relations Act, the Board hereby sets aside the above-referenced Decision and Order.¹ The

¹ Section 10(d) states "[u]ntil the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." See also *In re NLRB*, 304 U.S. 486 (1938)

Board will retain this case on its docket and take further action as appropriate.

Dated, Washington, D.C., June 27, 2014

By direction of the Board:



Gary Shinnors
Executive Secretary

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**HENRY MAYO NEWHALL
MEMORIAL HOSPITAL**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Nos. 13-1244

**Board Case No.
31-CB-012913**

CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 27(a)(4), counsel for the Board certifies the following: Henry Mayo Newhall Memorial Hospital, the petitioner herein, was the charging party in the case before the Board. The Board is the respondent herein, and the Board's General Counsel was a party to the case before the Board. California Nurses Association, National Nurses Organizing Committee was the respondent before the Board.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 30th day of June 2014

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**HENRY MAYO NEWHALL
MEMORIAL HOSPITAL**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Nos. 13-1244

**Board Case No.
31-CB-012913**

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 30th day of June 2014

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1244

September Term, 2013

NLRB-31CB012913

Filed On: August 15, 2014 [1507839]

Henry Mayo Newhall Memorial Hospital,

Petitioner

v.

National Labor Relations Board,

Respondent

ORDER

Upon consideration of respondent's motion to dismiss case, it is

ORDERED that the motion be granted, and this case be dismissed.

The Clerk is directed to transmit forthwith a certified copy of this order to the National Labor Relations Board in lieu of formal mandate.

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Mark A. Butler

Deputy Clerk